

MINUTES

Supreme Court's Advisory Committee
on the Rules of Appellate Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

February 22, 2012

ATTENDEES

Judge Gregory Orme
Judge Fred Voros
Diane Abegglen
Troy Booher
Paul Burke
Marian Decker
Bryan Pattison
Clark Sabey
Lori Seppi
Ann Marie Taliaferro
Joan Watt

EXCUSED

Tawni Anderson
Bridget Romano

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Joan Watt welcomed the committee members to the meeting. Lori Seppi stated that there should be a correction to the minutes to reflect that she volunteered to review the rules to see which ones still reference page limits, rather than word-counts. Judge Fred Voros suggested that the minutes be changed to more accurately reflect comments he made about the right to appointed counsel in child welfare proceedings. The committee agreed with those suggestions. Judge Voros then moved to approve the minutes with the changes. Paul Burke seconded the motion. The motion carried unanimously.

II. Rules Published for Public Comment

Staff informed the committee that the Supreme Court had approved the amendments to rules 4, 21, and 38A. Staff stated that the Supreme Court approved the rules as proposed by the committee.

III. Rule 38B - Scope of Representation

Ms. Watt reminded the committee members that approximately one year ago the committee had published for public comment the proposed amendments to Rule 38B, defining the scope of representation. After the public comment period, the committee had decided to wait until other amendments to Rule 38B were finalized, at which time the scope of representation amendments would be added. Because the other revisions to Rule 38B are not ready for public comment, Ms. Watt asked the committee members whether the scope of representation amendments should move forward at this time. The committee members agreed that the scope of representation amendments should still be tabled pending the completion of other amendments to Rule 38B.

IV. Rule 38B - Qualifications of Appellate Counsel

Judge Voros stated that the committee's proposal had been presented to the Appellate Representation Task Force. Judge Voros stated that the task force had concerns about the proposal and the task force suggested putting together a conference committee to work on a compromise between the two proposals. Ms. Watt stated that the task force was concerned about the elimination of specific requirements for qualification that had been expressly set forth in its proposal. Judge Voros stated that, although the task force had some concerns, the committee's proposal raised issues that the task force agreed warranted additional discussion. Ms. Watt suggested that the Rule 38B subcommittee be a part of the conference committee. The Rule 38B subcommittee members are Joan Watt, Marian Decker, Judge Fred Voros, and Clark Sabey. Ann Marie Taliaferro was also added to the conference committee.

Ms. Watt noted that one of the concerns of the task force was in having judges decide who will be on the roster. Judge Gregory Orme stated that judges will generally be less reluctant to remove someone from the roster as opposed to deciding who will be on the roster. Judge Orme stated that judges may be reluctant to review applications, briefs, and other qualifications. Judge Orme stated that this may place judges in a difficult position if an attorney who is approved for the roster is subsequently chastised or sanctioned by the court for inadequate work. Judge Orme stated that this will not be as much of an issue if the court's only role is to remove attorneys. Marian Decker noted that the judges would not have to do extensive reviews of applications and briefs because the roster review committee will have done all that work. Ms. Decker stated that the judges' role would be to review the committee's recommendations.

Troy Booher asked whether Rule 38B applies only to the qualifications of attorneys on briefing. Mr. Booher noted that petitions for interlocutory appeal are often done by trial attorneys. Ms. Watt stated that her office follows that practice. Judge Voros suggested that it is important for appellate counsel to consult with trial counsel as early as possible in the proceedings. Ms. Watt stated that consultation is important for the docketing statement.

Mr. Booher stated that the docketing statement seems antiquated. Judge Orme agreed, stating that the docketing statement may be too formal, as one of the main purposes is for scheduling. Judge Voros stated that there is much in the docketing statement that the court does

not need at that stage of the case. Ms. Watt suggested that Rule 9 be placed on a future agenda to discuss the amendments that could be made to the docketing statement requirements.

Ms. Watt asked whether the Court of Appeals uses docketing statements for summary disposition. Ms. Decker stated that, in her experience, the court relies on the docketing statement but it is usually for jurisdictional reasons. Judge Voros stated that the docketing statement is useful in pro se cases, allowing the court to more fully review whether a pro se case should be before the court. Judge Voros stated that he will discuss this issue with others on the court to determine which requirements are important. Mr. Booher suggested that Judge Voros speak with Pat Bartholomew and Lisa Collins to get their perspectives on what is important. The committee will discuss this issue at a future meeting.

V. Rules 24

Judge Orme stated that he had not had time to create a proposal for the committee but will have something in advance of the next meeting.

VI. Word Count Rules

Lori Seppi distributed a handout showing her review of the rules that contain page limits. Ms. Seppi stated that she did not have any particular recommendations. Ms. Seppi noted that form 8 still refers to page limits and needs to be changed. Staff agreed to change the forms and present the proposal to the committee. Judge Voros asked whether Ms. Seppi had reviewed the Tenth Circuit rules on these same issues. Ms. Seppi stated that she had not reviewed those rules. Ann Marie Taliaferro stated that she would review those rules for the next meeting. Troy Booher noted that the Tenth Circuit still has page limits for motions, while they have word limits for briefs.

VII. Over-length Briefs

Clark Sabey stated that the Supreme Court had asked him to present a proposal to tighten the language governing motions for over-length briefs. Mr. Sabey stated that the rule could perhaps clarify that such requests are “highly” disfavored. Ms. Booher noted that motions are granted for “good cause” and that standard essentially swallows the notion of such motions being disfavored. Mr. Booher stated that perhaps the standard should be “extraordinary circumstances.”

Mr. Sabey stated that the issue is complicated by the fact that the Supreme Court has one practice for addressing these motions, while the Court of Appeals may have another. Mr. Sabey stated that any rule change would need to accommodate both practices. Ms. Watt asked whether the Supreme Court was denying these motions more often. Mr. Sabey stated that he had not seen any motions granted for quite awhile. Mr. Booher suggested that if the court is already denying these motions, there isn’t a need for a change. Mr. Sabey suggested that a rule change would at least notify the bar that these motions will rarely be granted. Judge Orme agreed that it might be

helpful to notify the bar through a rule change, although the rule change may not affect current practices.

Judge Voros stated that the grammar of the rule is awkward because it places the focus on good cause and not on the fact that the motions are disfavored. Judge Voros stated that the grammar could be reworked, and when the amendment is published for public comment it will help provide notice to the bar of the strict requirements.

Mr. Sabey stated that the Supreme Court would also like to address in a different rule the limits for briefs in capital cases. Ms. Watt suggested that the rules not include a specific limit for capital cases. Ms. Watt stated that these cases are very complicated and hundreds of pages are the norm. Ms. Watt stated that counsel should be required to approach the court and explain why additional pages are necessary.

Mr. Booher suggested that requests for over-length briefs are often disguised requests for extensions of time. Mr. Sabey stated that the court is aware of that problem. Mr. Booher suggested that the rule could include a specific time frame for correcting briefs to help address this issue. Mr. Booher also suggested that the rule include a specific limitation on when requests for over-length briefs must be filed, such as no later than 7 days before the brief is due. Judge Voros asked whether similar issues apply in non-death capital cases. Ms. Watt stated that this is a bit unsettled and the U.S. Supreme Court has a case pending that might affect this issue.

Bryan Pattison stated that he had been reviewing rules from other circuits and noted that the Ninth Circuit has a word limit of 21,000 for capital cases as opposed to 14,000 for other cases. Mr. Pattison stated that the Ninth Circuit standard for granting requests for over-length briefs is a showing of “diligence” and “substantial need.” Mr. Pattison stated that the U.S. Supreme Court’s standard is “extraordinary circumstances.” Ms. Watt stated that she will consider the committee’s comments and propose language for the next meeting. Mr. Burke expressed a preference for the diligence and substantial need standard and noted that this standard would also work well in capital cases. Mr. Booher suggested that there may also be a need to address motions for extensions of time to add stronger language to support denials of more requests. Mr. Booher noted that extensions of time are important because work conflicts often arise, but the process is also abused. Mr. Burke asked whether the Supreme Court is as concerned about extensions as they are about over-length briefs. Mr. Sabey stated that the court is not as concerned but it will become more of an issue because the court’s backlog has cleared and therefore there will be more emphasis on moving these cases forward.

VIII. Adjourn

The committee scheduled its next meeting for March 21, 2012 at noon. The committee will also receive an update on Rule 23B at that time. The meeting adjourned at 1:30 p.m.